



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY* VALLEY REGIONAL OFFICE

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Secretary of Natural Resources

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Director

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Valley Regional Director

### **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO EVERGREEN LAND COMPANY FOR MOUNTAIN VALLEY FARM SUBDIVISION Permit No. WP4-08-0177**

#### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Evergreen Land Company, regarding the Mountain Valley Farm Subdivision, for the purpose of resolving certain violations of State Water Control Law and the applicable permit and/or regulations.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
5. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
6. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
7. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
8. "ELC" means Evergreen Land Company, a corporation authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. ELC is a "person" within the meaning of Va. Code § 62.1-44.3.
9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344).
12. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
13. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause

pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

14. "Property" or "Parcel" means the tract of land off Route 781, in Albemarle County, Virginia, owned by ELC. Off Fifth Street approximately 1.5 miles southwest of Interchange 23 on Interstate 64 in Albemarle County, Virginia, owned by ELC.
15. "VRO" means the Valley Regional Office of DEQ, located in Harrisonburg, Virginia.
16. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
17. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
18. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.14:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
19. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
20. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
21. "USACE" means the United States Army Corps of Engineers.
22. "Va. Code" means the Code of Virginia (1950), as amended.
23. "VAC" means the Virginia Administrative Code.
24. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.
25. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

**SECTION C: Findings of Fact and Conclusions of Law**

1. ELC owns a 566 acre housing development consisting of single family home rural estates at the Property in Albemarle County, Virginia.
2. On January 30, 2004, DEQ issued Virginia Water Protection Permit No. WP4-03-2610 (Permit I) to ELC for the Property with an expiration date of January 29, 2009. Permit I authorized permanent impacts to approximately 0.33 acre of palustrine, emergent wetlands, 793.75 linear feet of intermittent stream channel, and 362.77 linear feet of perennial stream channel associated with unnamed tributaries to Biscuit Run, each of which are considered State waters.
3. On July 26, 2006, DEQ issued Virginia Water Protection Permit No. WP4-06-1273 (Permit II) to ELC for the Property with an expiration of July 25, 2011. Permit II was to take the place of WP4-03-2610 since the permittee proposed to impact an additional 127.8 linear feet of perennial stream for construction of a road. Permit II authorized permanent impacts to approximately 0.33 acre of palustrine, emergent wetlands, 793.75 linear feet of intermittent stream channel, and 490.57 linear feet of perennial stream channel associated with unnamed tributaries to Biscuit Run, each of which is considered State waters.
4. On April 2, 2008, DEQ issued Virginia Water Protection Permit No. WP4-08-0177 (Permit III) to ELC for the Property with an expiration date of April 1, 2015. Permit III was to take the place of WP4-06-1273 since the permittee proposed to impact an additional 47 linear feet of perennial stream for the correction of an improperly placed culvert serving a road. Permit III authorized permanent impacts to approximately 0.33 acre of palustrine, emergent wetlands and 1,332 linear feet of stream channel associated with unnamed tributaries to Biscuit Run, each of which is considered State waters.
5. On March 9, 2009, Department staff inspected the Property to verify compliance with Permit III. The DEQ inspector noted, following a file review prior to the inspection, that the semi-annual construction monitoring report due December 10, 2008, had not been received. During the inspection, staff observed an unknown quantity of sediment in the stream below the culvert at Impact #9 which was attributed to inadequate E&S controls; and that construction of the cross vanes and weirs at Impact #1 was not complete. A previously approved corrective action plan required the installation of cross vanes and weirs to address an incorrectly installed culvert.
6. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit dredging or filling of surface waters or discharging pollutants except in compliance with a VWP permit issued by the Director.
7. 9 VAC 25-210-90 requires permittees to comply with all conditions of the VWP permit.
8. On March 24, 2009, DEQ issued Warning Letter No. W2009-03-V-1021 to ELC for the alleged violations cited in (C6) and (C7) above observed during the March 9, 2009,

inspection which included the failure to submit the semi-annual construction monitoring report due December 10, 2008, presence of an unknown quantity of sediment in the stream below the culvert at Impact #9 impacting less than 50 linear feet of stream, and the failure to complete construction of the cross vanes and weirs at Impact #1 and failure to provide the compensation monitoring report due November 30, 2008. (Note: After further investigation, the citation for the compensation monitoring report was determined not to be a violation).

9. On April 7, 2009, ELC's engineering consultant submitted a construction monitoring report in response to the Warning Letter. The monitoring report indicated that a vegetative assessment of the original compensation areas for the Project (riparian buffer and wetland enhancement areas) documented that only 594 of the 3,120 trees required by the approved mitigation plan. The engineering consultant confirmed the observations in the Warning Letter and that the cross vanes and weirs permitted as a corrective action for an improperly placed culvert at impact #1 still had not been constructed.
10. On April 27, 2009, DEQ issued NOV No. W2009-04-V-0013 to ELC for the alleged violation cited in (C7) and (C8) above for the late submittal of the semi-annual construction monitoring report due December 10, 2008, failure to follow the approved final mitigation plan's requirements for planting the proper numbers of trees in the riparian buffer enhancement area, discharge of an unknown quantity of sediment in the stream below the culvert at Impact #9 impacting less than 50 linear feet of stream, and failure to construct the cross vanes and weirs required as a corrective action for an improperly placed culvert.
11. On June 23, 2009, Department staff met with representatives of ELC to discuss the alleged violations and corrective actions necessary for ELC to return to compliance. During the June 23, 2009 meeting, ELC asserted that its construction contractor is primarily responsible for the majority of the problems on site. ELC also indicated that the outstanding cross vanes and weirs were now installed. DEQ requested the ELC submit a plan and schedule of corrective actions to address the outstanding non-compliance issues.
12. By letter dated July 13, 2009, ELC notified DEQ that on June 2 and June 23, 2009, ELC representatives revisited the Project and noted that the stream buffers along the stream restoration reach were not planted according to the Stream Mitigation Planting Plan. (These plantings were required as part of a corrective action plan to address the improperly placed culvert and not part of the original compensation areas). Also, included in the July 13, 2009, letter, were photographs documenting the installation of the outstanding cross vanes and weirs as noted during the June 2 and June 23, 2009 visits.
13. Based on the March 9, 2009 inspection, the June 23, 2009 meeting, the file review and the documentation submitted on April 7, 2009 and July 13, 2009, the Board concludes that ELC has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50. and 9 VAC 25-210-90 and the Permit as described in paragraph (C6) and (C7) above.

14. On July 13, 2009 and August 24, 2009, ELC submitted a written Corrective Action Plan for incorporation into a proposed Consent Order to address the outstanding violations.
15. In order for ELC to return to compliance, DEQ staff and representatives of ELC have agreed to the Schedule of Compliance, which will be incorporated as Appendix A of this Order.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders ELC, and ELC agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of **\$8236** within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

ELC shall include its Federal Employer Identification Number (FEIN) [(54-1587700)] with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF).

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of ELC for good cause shown by ELC, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, ELC admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. ELC consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. ELC declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by ELC to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. ELC shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. ELC shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. ELC shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the ELC intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.


9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and ELC. Nevertheless, ELC agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. ELC petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to ELC.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve ELC from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by ELC and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of ELC certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind ELC to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of ELC.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Evergreen Land Company voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 24<sup>th</sup> day of June, 2010, 2009.

  
Amy T. Owens, Valley Regional Director  
Department of Environmental Quality



Evergreen Land Company voluntarily agrees to the issuance of this Order.

Date: 10/7/09 By: [Signature], President  
(Person) (Title)  
Evergreen Land Company

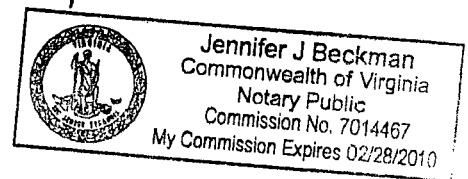
Commonwealth of Virginia  
City/County of Charlottesville

The foregoing document was signed and acknowledged before me this 7<sup>th</sup> day of  
October, 2009, by Gaylon Brights who is  
President of Evergreen Land Company on behalf of the company.

[Signature]  
Notary Public  
7014467  
Registration No.

My commission expires: 2/28/2010

Notary seal:



## **APPENDIX A SCHEDULE OF COMPLIANCE**

1. ELC shall immediately cease impact state water and shall not resume such impacts unless authorization from DEQ is granted via a Permit.
2. ELC shall implement and comply with the approved Corrective Action Plan (CAP). Any changes to the approved CAP or schedule shall not be initiated without advance notice to and approval by DEQ.
3. ELC shall comply with the requirements of its Permit, except as specified in this Order and the approved Corrective Action Plan.
4. Unless otherwise specified in this Order, ELC shall submit all requirements of Appendix A of this Order to:

**Jason Dameron**  
**Environmental Specialist II**  
**VA DEQ –Valley Regional Office**  
**P.O. Box 3000**  
**Harrisonburg, VA 22801**  
**(540) 574-7824 Phone**  
**(540) 574-7878 Fax**  
[Jason.dameron@deq.virginia.gov](mailto:Jason.dameron@deq.virginia.gov)

and copy

**Steve Hetrick**  
**Enforcement Specialist Sr.**  
**VA DEQ –Valley Regional Office**  
**P.O. Box 3000**  
**Harrisonburg, VA 22801**  
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